



INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-567 (Advisory Opinion Proceeding 2)]

Certain Foam Footwear; Institution of an Advisory Opinion Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to institute an advisory opinion proceeding in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the underlying investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. ("Crocs") of Niwot, Colorado. 71 FR 27514-15 (May 11, 2006). The complaint alleged, *inter alia*, violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858 ("the '858 patent") and U.S. Patent No. D517,789 ("the '789 patent"). The notice of investigation named several respondents, including Double Diamond Distribution Ltd. ("Double Diamond") of Saskatoon, Canada.

On July 25, 2008, the Commission issued a final determination finding no violation of section 337 based on non-infringement and failure to satisfy the technical prong of the domestic

industry requirement with respect to the '789 patent, and based on invalidity of the '858 patent as obvious under 35 U.S.C. 103. 73 FR 45073-74 (Aug. 1, 2008). On July 15, 2011, after an appeal to the U.S. Court of Appeals for the Federal Circuit and subsequent remand vacating the Commission's previous finding of no violation, the Commission found a violation of section 337 based on infringement of the asserted claims of the patents and issued a general exclusion order ("GEO") and, *inter alia*, a cease and desist order ("CDO") directed against Double Diamond. 76 FR 43723-24 (July 21, 2011).

On March 28, 2020, the '789 patent expired, so the GEO and CDO are now only directed to articles that infringe one or more of claims 1 and 2 of the '858 patent. Subsequently, on December 8, 2020, Double Diamond petitioned for institution of an expedited advisory opinion proceeding to determine whether its Original Beach DAWGS™ shoes with plastic washers are covered by the GEO or CDO. On December 18, 2020, Crocs opposed Double Diamond's petition for an expedited advisory opinion proceeding. On December 22, 2020, Double Diamond moved for leave to file a reply to Crocs' opposition.

The Commission has determined that Double Diamond's petition complies with the requirements for institution of an advisory opinion proceeding under Commission Rule 210.79 to determine whether its Original Beach DAWGS™ shoes with plastic washers fall within the scope of the GEO or CDO. Accordingly, the Commission has determined to institute an advisory opinion proceeding and refer it to the Office of the General Counsel. The parties will furnish the Office of the General Counsel with information as requested in the accompanying order, and the Commission will issue an advisory opinion within ninety (90) days of the date of publication of this notice in the *Federal Register*. The following entities are named as parties to the proceeding: (1) Double Diamond and (2) Crocs. The Commission has determined to grant Double Diamond's motion for leave to file a reply to Crocs' opposition.

The Commission vote for this determination took place on January 7, 2021.

The authority for the Commission's determination is contained in section 337 of the

Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: January 7, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021-00477 Filed: 1/12/2021 8:45 am; Publication Date: 1/13/2021]